ELEGANT SCOPE TRAVEL & TOURS SDN BHD A

v.

CDL HOTELS (MALAYSIA) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR B
ASMABI MOHAMAD JC
[CIVIL ACTION NO: S6-22-581-2007]
13 JANUARY 2012

CONTRACT: *Breach - Agreement - Option to renew - Whether automatic - Whether failure to renew agreement constituted breach - Whether renewal subject to strict compliance with terms and conditions of agreement - Whether there was concluded contract between parties* C

CONTRACT: *Breach - Damages - Claim for - Special and general damages - Whether claims substantiated with evidence - Whether claims proven* D

The plaintiff commenced an action against the defendant for loss and damage suffered as a result of breach of the terms of an agreement in which the plaintiff was to provide limousine services E to the Regent Hotel Kuala Lumpur which was operated and managed by the defendant. Pursuant to the agreement, the plaintiff was exclusively appointed to provide luxury limousine transportation services to the defendant's guests at various hotels for a contractual term of three years with an automatic extension F of two years. The plaintiff contended that relying on the agreement, it had invested on new and refurbished limousines and incurred additional expenses to modify and register the limousines. The plaintiff also contended that the defendant had agreed in principle to renew the contract for another term of two years G with an increased operating fee agreed to by the plaintiff. However, the defendant alleged that the agreement was subsequently terminated on the ground of the plaintiff's failure to comply with the terms and conditions of the agreement. The plaintiff was therefore not entitled to exercise its option to renew H the agreement upon expiry of the original agreement under cl. 1 of the agreement. It was the defendant's further case that among the agreement's crucial terms was the requirement for the plaintiff to replace its existing fleet of limousines which were old and used between eight to 15 years, not in good working order and with I

A mechanical problems. The failure to comply with this term had affected the standard of services provided by the plaintiff and was not consistent with that of the first class hotel as envisaged under the agreement. The issues which arose for the court's determination were, *inter alia*: (i) whether the plaintiff was entitled B to an automatic renewal of the agreement for another term of two years pursuant to cl. 1 of the agreement; (ii) whether the option to renew was subject to the plaintiff complying with all the terms and conditions of the agreement; (iii) whether the plaintiff had legitimate expectation that the agreement would be automatically C renewed for another period of two years; (iv) whether there was a concluded contract between the plaintiff and the defendant; and (v) whether the plaintiff was entitled to damages.

Held (dismissing plaintiff's claims with costs):

D

(1) Clause 1 of the agreement provides that the plaintiff shall be entitled to exercise its option to renew the agreement for another two years subject to the performance of its obligations under the agreement. However, on the evidence, the plaintiff had not complied with the requirement of cl. 1. The plaintiff E had breached the main term of the agreement which required replacement of limousines which were of seven years old and more with new limousines. The plaintiff had also failed to comply with cl. 4(b) and (c) of the agreement which required it to provide services at a level consistent with the operation F of a first class hotel. Hence, the plaintiff had failed to comply with the crucial terms of the agreement and was not entitled to exercise the option under cl. 1. (paras 35-39)

(2) There was no merit in the plaintiff's contention that it had a G legitimate expectation that the agreement would be automatically renewed for another two years based on the increased maintenance costs incurred. The plaintiff would still have to incur and bear the expenses to continue with the services. Further, the plaintiff had been put to notice earlier H that the renewal was not automatic but subject to its due adherence to the terms and conditions of the agreement. (para 41)

(3) It was obvious from the evidence that each party to the I agreement was making proposals and counter proposals on the new terms to be incorporated in the intended renewal. In the interim, the agreement between the plaintiff and the defendant

was extended on a month to month basis in order to enable the parties to discuss, renegotiate and resolve the outstanding issues. Hence, there was no conclusive agreement reached between the parties. (paras 42 & 52)

(4) It is trite that the plaintiff must prove its claim for special and general damages. However, in the instant case, the plaintiff had failed to substantiate its claims for damages. Further, the plaintiff's allegations that the plaintiff and its employees were wrongfully evicted, threatened, embarrassed and humiliated by the defendant were also not supported by credible evidence. The plaintiff's claim for aggravated and exemplary damages remained unproved. (paras 53 & 57)

Case(s) referred to:
Bonham-Carter v. Hyde Park Hotel [1948] WN 89 ***(refd)***
Kapt (B) Mohamad Ismail v. Perwira Affin Bank Bhd (No 2) [2001] 5 CLJ 184 HC ***(refd)***
Letrik Bandar Hup Heng Sdn Bhd v. Wong Sai Hong [2002] 5 CLJ 170 HC ***(refd)***
Sunlite Textile Sdn Bhd v. Motilal Realty Sdn Bhd [2008] 7 CLJ 97 HC ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 7

For the plaintiff - Cedric Miranda; M/s Cedric Miranda & Co
For the defendant - Thomas Wong Wai Keong; M/s Thomas Wong

Reported by S Barathi

JUDGMENT

Asmabi Mohamad JC:

Introduction

[1] The plaintiff which is a limousines company had entered into an agreement with the defendant to provide limousines services to the Regent Hotel Kuala Lumpur, a hotel operated and managed by the defendant. The plaintiff commenced this action against the defendant for loss and damage suffered as a result of the alleged breach of the terms of the agreement. The plaintiff claimed against the defendant for loss of RM7.8 million, general damages for wrongful eviction, aggravated and exemplary damages and other relief this court deemed fit.

[2] This case proceeded by way of a full hearing wherein three witnesses testified for the plaintiff and four witnesses testified for the defendant.

[3] After giving full consideration to the evidence, both documentary as well as testimonial, and the submissions by all the learned counsels for the respective parties, I dismissed the plaintiffs' claims against the defendant with costs of RM10,000 to be paid by the plaintiff to the defendant.

[4] The plaintiff being dissatisfied with the said decision appealed to the Court of Appeal against the whole of the said decision.

The Documents

[5] The relevant documents referred to in the course of this trial were as follows:

Documents	Marked
i. The Pleadings	Document "A"
ii. Common Bundle of Documents	Document "B1"
iii. Additional Common Bundle of Documents	Document "B2"
iv. Principal Issues for Trial	Document "C"
v. Statement of Agreed Facts	Document "D"

Issues To Be Tried

[6] The plaintiff listed 29 issues to be tried, the particulars of which are as stated in document marked as "C". I have summarised the principal issues to be tried as follows:

(a) Whether pursuant to cl. 1 of the agreement dated 29 November 2002 (exh. "P-1" – p. 1-18 of "B1") ("the agreement") plaintiff was entitled to an automatic renewal of the agreement for another term of two years upon the expiry of the initial term of three years;

(b) Whether the option to renew the agreement for another period of two years upon the expiry of the initial period of three years was subject to the plaintiff complying with all the terms and conditions of the agreement;

(c) Whether the plaintiff had the legitimate expectation that the agreement would be extended automatically for another period of two years upon the expiry of the initial three year period under the agreement;

(d) Whether there was a concluded contract between the plaintiff and the defendant; and

(e) Whether the plaintiff was entitled to damages as claimed in the statement of claim ("SOC")

The Plaintiff's Case

[7] The plaintiff's Executive Director, one Mr Mak Siew Fong ("PW3") confirmed the existence of the agreement. According to PW3 pursuant to the agreement the defendant had exclusively appointed the plaintiff as the official "Luxury Limousine Service Operator" to provide luxury limousine transportation services for tourists, visitors and guests of the various hotels of the defendant namely the Regent Hotel Kuala Lumpur, Four Seasons Hotel Inc and Four Seasons Hotel Limited Kuala Lumpur for a contractual term of three years with an automatic extension for a further period of two years (see cl. 1 of the agreement at p. 2 of "B1" – exh. "P-1").

[8] In order to meet its obligation under the agreement the plaintiff was required to invest on new and refurbished limousines. The plaintiff too had to incur additional expenses to modify and register its limousines for the said purpose. The plaintiff had invested between RM2 million to RM5 million towards this end and would require about five years to recoup its investments provided the plaintiff's tenure under the agreement was for a period of five years as agreed. To ensure that the plaintiff was assured of the five year contract the plaintiff had insisted for an automatic renewal clause to be incorporated into the agreement (cl. 1 of the agreement at p. 2 of "B1" – exh. "P-1").

[9] The plaintiff had also incurred RM350,000 per year for the maintenance and upkeep of the limousines. Pursuant to cl. 5 of the agreement (p. 4 of "B1") the plaintiff had to pay the defendant RM9,000 as concession fee per month in exchange of the exclusive appointment as "Luxury Limousines Service Operator" and a further fee 12% of the total payments issued by the defendant to the plaintiff as an operating fee. In addition to

A that the plaintiff had to provide limousines services free of charge for the use of the defendant's officers and or its employees up to the limit of RM12,000.

[10] In view of the provision of cl. 1 of the agreement the B plaintiff had made the necessary arrangements such as instructing its solicitor to prepare the draft agreement for the renewal (see evidence of PW1), the extension of the hire purchase agreement for the limousines, payment of fees for permits, renewal of insurance, renewal of drivers' contract and also payment of C solicitor's fees.

[11] *Vide* a notice dated 27 July 2005 (p. 21 of "B1" – exh. "P-6") the plaintiff had indicated its intention to exercise the option to renew the agreement for another term of two years. But there was no reply from the defendant as there was a change D in the management of the defendant.

[12] PW1 testified that the defendant had agreed in principle to renew the plaintiff's contract for another term of two years. However the defendant had sought to amend the operating fee of E 12% to 13.5% on all limousine charges and this was agreed to by the plaintiff because the plaintiff had wanted to maintain a good relationship with the defendant. While waiting for the agreement to be finalised the plaintiff continued to provide the limousine services to the defendant's guests on a month to month basis.

F

[13] *Vide* exh. "P-8" (p. 23 of B1") the defendant had acknowledged the plaintiff's request to renew the agreement. However the defendant informed the plaintiff of the need to discuss unresolved issues especially pertaining to the plaintiff's G ageing limousines. On 11 September 2006 (exh. "P-9" – p. 26 of "B1") the defendant through its solicitors had requested for the plaintiff to replace the entire fleet of limousines within 30 days failing which the defendant would terminate the agreement.

H **[14]** The plaintiff was shocked and had no idea why the defendant had reacted in that manner especially when the plaintiff had earlier acceded to the defendant's request to absorb additional in house costs such as Airport Representative at RM4,200 per month, concession fee of RM9,000, operating fee of 13.5% on total sales through limousines counter in the Hotel, stand fee of I RM9,000 per month and the provision of limousines for house use which terms were agreed by the plaintiff in order to maintain the good relationship between parties.

[15] The plaintiff had instructed its solicitor to reply that there was no legal requirement for the plaintiff to comply with the defendant's request to replace the ageing fleet of limousines as the plaintiff's limousines are German make, extremely durable and roadworthy. Besides that it was not possible for the plaintiff to change the entire fleet of limousines as the Hotel's occupancy rate was dwindling and there was a drop in the plaintiff's business (p. 28 of "B1" exh. "P-10"). Further the plaintiff felt the defendant's demand was mischievous.

[16] The defendant *vide* its letter dated 2 October 2006 (exh. "P-11" – p. 30 of "B1") claimed that the negotiations for the renewal of the agreement had not been concluded and was still harping on the issue of the ageing fleet of limousines. The defendant too had threatened to terminate the agreement if the plaintiff did not replace its ageing fleet of limousines with new limousines. The defendant's action was unreasonable and unfair as the agreement made no provision for the entire fleet to be replaced at one go. Further in view of the automatic renewal clause the plaintiff had a legitimate expectation for the agreement to be renewed automatically.

[17] However on 17 October 2006 (exh. "P-4" – p. 24 of "B1") the defendant terminated the plaintiff's limousines services by giving the plaintiff less than 24 hours notice. Pursuant to the said letter the plaintiff and its employees were ordered to vacate the defendant's premise by 5pm on the same day. The defendant had ordered its staff to vacate its premises and in the course of that there were threats made, causing embarrassment and humiliation to the plaintiff and its employees. PW2, the plaintiff's second witness who was one of the plaintiff's drivers testified of occurrence of the 17 October 2006 incident where the plaintiff and its employees were ordered out of the defendant's premises on the same day without sufficient notice.

[18] At the time the agreement was terminated the plaintiff claimed that its rental charges for two months were still overdue and payable by the defendant.

[19] In view of the defendant's breach of the terms of the agreement the plaintiff had suffered loss and damage as stated in the para. 22 and 23 of the SOC.

The Defendant's Case

[20] Mr Ong Teik Leong the defendant's first witness (DW1) confirmed the existence of exh. P-1 but testified that the agreement only covered the Regent Hotel, managed and operated by the defendant. PW1 also confirmed that the agreement contained a provision entitling the plaintiff to exercise its option to renew the agreement upon the expiry of the original agreement. However DW1 disagreed that the plaintiff is entitled to an automatic renewal of the agreement as claimed.

[21] PW1 testified that the renewal of the agreement shall be subject to the condition that the plaintiff had performed all its obligations pursuant to the terms and conditions stipulated therein. As the plaintiff had not complied with the terms and conditions of the agreement the plaintiff was not entitled to exercise its option under cl. 1 of the agreement.

[22] According to PW1 pursuant to cl. 4(b) of the agreement (exh. "P-1" – p. 3 of "B1") the plaintiff was required to provide its limousine services to the level which was consistent with that of a first class hotel. The plaintiff had also agreed that all limousines plus equipment and accessories shall be kept in optimum working order, were of good quality and appropriate for the purpose of the agreement (cl. 4(c) of exh. "P-1" – p. 4 of "B1").

[23] The plaintiff had failed to comply with the terms and conditions of the agreement as there were complaints by the defendant's guests and senior officers of the defendant that the plaintiff's limousines were old (see p. 55 of "B1") and were not running smoothly and had engine and/or mechanical problems. The defendant had on many occasions raised with the plaintiff, the issue pertaining to the plaintiff's old and ageing fleet of limousines (p. 53, 54-55, 56, 57, 58, 23, 26-27, 30-31 of "B1" and the evidence of DW2). However there was no genuine attempt made by the plaintiff to change, if not all, some of its old fleet of limousines. The plaintiff still insisted on using the same old fleet of limousines for another two years upon the expiry of the agreement on 30 November 2005.

[24] As a result of these problems when the plaintiff issued the letter notifying the defendant of its option to renew the agreement the defendant had reservations. There were communications and

contemporaneous documents to prove that both parties had discussions and negotiations before and after the expiry of the agreement pertaining to the plaintiff's obligations under the agreement. There were proposals and counter proposals made by both parties. These negotiations and discussions were ongoing from the time the contract was still subsisting until its expiry on 30 November 2005 and even subsequent to that.

[25] The plaintiff had full knowledge and information that among the new terms proposed by both parties for the purpose of the renewal of the agreement the most crucial term was the requirement for the plaintiff to replace its existing fleet of limousines due to the fact the plaintiff's current limousines were old and used limousines between eight to 15 years old, not in good working order and with mechanical problems. As such the standard of the services provided by the plaintiff were not consistent with that of the first class Hotel as envisaged under the agreement. The plaintiff's services did not provide the comfort to the defendant's guests to the level expected of a five star Hotel.

[26] The plaintiff was fully aware that as far as the defendant was concerned it would not be agreeable to continue with the plaintiff's services if the plaintiff still insisted on using its existing fleet of limousines. The defendant had on many occasions informed the plaintiff to replace its existing fleet of limousines as the plaintiff's limousines services had affected the defendant's image as a five star Hotel. The replacement of the limousines was described by the defendant as "top priority" since most of the limousines were between eight to 15 years at the material time. (Exhibit "P-8" – p. 23 of "B1"; exh. "P-3" – p. 52 of "B1"; ("D-16" – p. 54-55 of "B1"; exh. "D-19" – p. 56 of "B1"; exh. "D-20" – p. 57 of "B1").

[27] The contemporaneous documents showed that the plaintiff and the defendant were still in the process of negotiating the terms of the agreement, the chronology of events pertaining to the discussions and negotiations were as stated in para. 20 and 21 of the SOC (Q and A 14 of WSDW1). Whilst these negotiations were in progress the Plaintiff was allowed to continue to operate its limousine services on a month to month basis with effect from 5 December 2005 (p. 59 of "B1" – facts not disputed by the plaintiff). The plaintiff had never objected to the month to month contract and or insisted on the automatic renewal of the agreement to be enforced.

[28] As the parties were not *ad idem* there was no contract concluded between parties. The defendant was left with no option but to terminate the plaintiff's services.

[29] The plaintiff's claim that the notice to terminate the month to month agreement was less than 30 days was not true as the defendant *via* its solicitor had given ample notice to the plaintiff which had lapsed on 17 October 2006 (p. 26-27 of "B1" exh. "P-9"; p. 30-31 of "B1").

[30] Further the defendant claimed that principle of legitimate expectation shall not apply to the factual matrix of this case as the contemporaneous documents clearly showed that both parties were aggressively negotiating for new terms to be incorporated into the agreement and as such no agreement was reached between parties. The plaintiff had full information and knowledge pertaining to the intentions of parties after the date of the notice dated 27 July 2006 was issued. Even cl. 1 of the agreement provided that the option to renew the agreement for a further period of three years was subject to the plaintiff's compliance with the terms and conditions of the agreement.

[31] Up to the 17 October 2006 the plaintiff made no attempts to replace its aged fleet of limousines. The defendant was therefore justified in terminating the month to month agreement.

[32] The defendant denied that the plaintiff had incurred RM350,000 for purposes of the renewal of the agreement and or that the plaintiff suffered loss of revenue up to RM7,800,000 for the period of two years as claimed as both parties could not come to terms and therefore the agreement had lapsed on 17 October 2006. As such the issue that the plaintiff would be denied of its revenue of RM7,800,000 did not arise.

[33] PW1 denied that the plaintiff and its employees were threatened and harassed by the defendant on 17 October 2006. PW2's evidence was supported by the evidence of DW2, DW3 and DW4.

Findings Of The Court

Issue (a) And (b)

a. Whether pursuant to cl. 1 of the agreement dated 29 November 2002 the plaintiff was entitled to an automatic renewal of the agreement for another term of two years upon the expiry of the initial term of three years; and

b. Whether the option to renew the agreement for another period of two years upon the expiry of the initial period of three years was subject to the plaintiff complying with all the terms and conditions of the agreement;

[34] Clause 1 of the agreement gave the option to the plaintiff to renew the agreement for another period of two years provided a notice in writing of its intention to renew the agreement was served on the defendant at least two months prior to the expiry of the agreement on 30 November 2005. Notwithstanding the words 'automatically renewed' were used, the whole context of cl. 1 would have to be read in order to give effect to the said clause.

[35] On reading cl. 1, I am of the view that cl. 1 did not give the plaintiff an automatic right of renewal of the agreement. The clause provided that the plaintiff shall be entitled to exercise the option to renew the agreement for another period of two years so long as the plaintiff shall during the continuance of the agreement operate and perform all its obligations under the agreement.

[36] From the evidence adduced during the trial both testimonial and documentaries, the plaintiff had not complied with the requirement of cl. 1 in that the plaintiff had breached the main terms of the agreement (Appendix A at p. 18 of "B1") which stated that the plaintiff must replace its Mercedes Benz which were seven years and above. The plaintiff's Mercedes Benz which were supposed to be a luxury vehicle for use of the Regent Hotel which is a five star hotel, were between eight to 15 years old (see p. 55 of "B1"). The plaintiff had not complied with the terms of the agreement to ensure that it replaced its limousines which were seven years old with new limousines as agreed. Even the Draft Agreement (p. 35 to 49 of "B1" (exh. "P-13") which was prepared by (PW1) for the renewal of the agreement made no mention of the replacement of the plaintiff's old and ageing limousines.

[37] The plaintiff had also failed to comply with cl. 4(b) and (c) of the agreement in that it shall perform its services at a level consistent with the operation of a first class hotel and ensure that all vehicles together with their fittings and accessories were kept in optimum working order, were of good quality and appropriate for the use of a five star hotel (see the evidence of DW2 and pp. 56-57 of "B1" (exh. "D-19" and "D-20")).

[38] At all times, the plaintiff was aware of the requirement to replace its ageing fleet of limousines was the major concern of the defendant so as not to affect the defendant's image of a five star hotel. The plaintiff was not interested to replace its fleet of limousines and insisted in maintaining the old fleet for a further two years for the intended renewal of the agreement. Despite the plaintiff's assurances (p. 54 of "B1' (exh. "D-16" dated 16 February 2005) and p. 58 (exh. "P-17" dated 14 April 2005)) that it would from time to time replace its limousines, until the 17 October 2006 (a period of almost one and a half years) not a single new limousine was purchased to replace the old and ageing limousines.

[39] As the plaintiff had failed to comply with the crucial terms of the agreement as discussed above obviously the plaintiff was not entitled to exercise the option under cl. 1.

[40] In view of the above, Issue (a) would have to be answered in the negative and Issue (b) would have to answered in the affirmative.

Issue (c)

Whether The Plaintiff Had The Legitimate Expectation That The Agreement Would Be Automatically Renewed For Another Period Of Two Years Upon The Expiry Of The Initial Three Year Period Under The Agreement

[41] The plaintiff's contention that it had a legitimate expectation that the agreement would be automatically renewed for another two years based on the increased maintenance costs of the limousines incurred by the plaintiff had no merits. The plaintiff would, in any event, have to incur and bear these maintenance fees for the purpose of the agreement as well as the month to month agreement to enable the plaintiff to continue with the said services. Further in view of the provision of the cl. 1 of the agreement the plaintiff would have been put to notice as early as

the 29 November 2002 that the renewal was not automatic but subject to the plaintiff's due adherence to the terms and conditions of the agreement. The answer to Issue (c) would have to be answered in the negative.

Issue (d)

Whether There Was A Concluded Contract Between The Plaintiff And The Defendant

[42] As I have illustrated earlier both the plaintiff and the defendant had entered into series of discussions and negotiations even from the time the agreement was still subsisting up to the time the notice of intention to exercise its option under cl. 1 of the agreement was issued to the defendant and even months after the expiry of the agreement which was on 30 November 2005. From the evidence both testimonial as well as documentaries it was obvious that each party to the agreement was making proposals and counter proposals on the new terms to be incorporated in the intended renewal agreement but there was no conclusive agreement reached.

[43] The defendant which operates a five star hotel had proposed for the plaintiff's old and ageing limousines to be replaced, which term was as provided in Appendix A of the agreement (p. 18 of "B1" (exh. "P-1")) but this was not acceptable to the plaintiff.

[44] The essential term of the agreement was for the plaintiff to provide limousines services for the guests of a five star hotel such as the one operated and managed by the defendant (also admitted by PW3 in Q and A 6) therefore it was a reasonable and essential term desired by the defendant in that the old fleet comprising of limousines which were from 8-15 years old to be replaced with new ones. Further these limousines were not in tip top condition and as such the plaintiff was not able to provide its services which were consistent with the operation of a first class hotel expected by the defendant, thereby jeopardizing the image and performance of the defendant's hotel.

[45] The age of the plaintiff's fleet of limousines as shown at p. 55 of "B1" showed the defendant's concern over the plaintiff's old and ageing fleet and calling for their replacement was justifiable. Despite the conditions of the fleet which were old and not in good order the plaintiff still insisted for the agreement to be renewed without doing anything to its fleet of limousine. The issue

pertaining to the plaintiff's old and ageing fleet of limousines was not a new issue raised by the defendant in fact this had been a priority topic of series of discussions and negotiations which were dated as back as February 2005 and April 2005 respectively.

[46] It was within the plaintiff's knowledge, even some months before the expiry of agreement and during the continuance of the month to month agreement that the main concern of the defendant was the condition of the plaintiff's fleet of limousine.

[47] Both the testimonial as well as documentary evidence had shown that both parties were in the state of discussions and negotiations and there were proposals and counter proposals made (see pp. 54-55 and p. 58 of "B1" (exh. "D-16" and "D-17")). However the counter-proposals were not acceptable to the defendant.

[48] The draft renewal agreement (see pp. 35 to 49 of "B1" (exh. P-13)) prepared by PW1, who was the solicitor for the plaintiff which was submitted to the defendant was merely a proposal and was still subject to agreement by both parties (see p. 1 of "B2" (exh. "P-2")).

[49] It is evidenced from exh. "P-3" and exh. P-13" (p. 50-51 and p. 35 to 49 of "B1") up to 12 June 2006 that both parties have not resolved outstanding issues between them and could not come to an agreement. The proposals had not been converted into a promise as there was no absolute and unqualified acceptance by either party to the agreement as envisaged by s. 7 of the Contracts Act 1950 (see pp. 50-51, 54-55 and 58 of "B1" (exhs. "P-3", "D-16" and "P-17" respectively)). From the conduct of the parties herein it was obvious that the parties were not *ad idem*.

[50] As at 11 September 2006 (exh. "P-9" – p. 26-27 of "B1") despite numerous rounds of discussions and negotiations parties could not come to terms to conclude the agreement. On this date the defendant *via* its solicitors had caused a notice to be issued to the plaintiff notifying the plaintiff of the requirement to replace its old and ageing fleet of limousine if the plaintiff was still desirous of renewing the agreement for a further period of two years. In the same letter the defendant had given notice that it was left with no choice but to terminate the month to month agreement if the plaintiff failed to comply with the said notice.

[51] The notice dated 11 September 2006 was not the first notice issued to the plaintiff, notifying the plaintiff of its old and ageing fleet of limousines. The defendant had in fact notified the plaintiff of the state of affairs of the plaintiff's limousines as early as February 2005 (p. 53-55, p. 58 (exh. "P-17") of "B1"). The plaintiff was fully aware of the defendant's requirement as early as February 2005 and/or April 2005.

[52] Further the fact that the plaintiff had agreed to accede to the defendant's request to continue to provide the limousine services to the defendant's guests on a month to month basis proved that the plaintiff understood that the renewal of the agreement was not automatic. Otherwise the plaintiff would have insisted on the performance of the provision of cl. 1 upon the expiry of the agreement on 30 November 2005. The plaintiff also knew that the agreement was extended on a month to month basis in order to enable the parties to the agreement to discuss, renegotiate and resolve outstanding issues between parties before the agreement could be finalised. Therefore there was no concluded agreement between the plaintiff and the defendant. In view of the above, issue (d) would have to be answered in the negative.

Issue (e)

Whether The Plaintiff Was Entitled To Damages As Claimed In The SOC

[53] It is trite that the plaintiff must prove its claim for special and general damages. The plaintiff must not say that it is claiming for this and that without proving its claim by way of documentary evidence, if not primary, secondary evidence or oral evidence through its witnesses. In this regard I wish to quote the classical dictum enunciated by His Lordship Lord Goddard in the case of *Bonham-Carter v. Hyde Park Hotel* [1948] WN 89 which had been quoted by the courts a million times, as follows:

> Plaintiff must understand that if they bring actions for damages it is for them to prove their damages; it is not enough to write down the particulars, and so to speak, throw them at the head of the court, saying, "This is what I have lost, I ask you to give me these damages". They have to prove it.

(please also see *Kapt (B) Mohamad Ismail v. Perwira Affin Bank Bhd (No 2)* [2001] 5 CLJ 184; *Sunlite Textile Sdn Bhd v. Motilal Realty Sdn Bhd* [2008] 7 CLJ 97; *Letrik Bandar Hup Heng Sdn Bhd v. Wong Sai Hong* [2002] 5 CLJ 170).

[54] Having realised that the plaintiff could not substantiate its claim for damages as prayed in para. 19 to 25 of the SOC, the plaintiff through its witness PW3 prayed for RM2 million per year instead, for loss of profit, costs of refurbishing the limousines and all related expenses such as obtaining the permits for the limousines and the inspection by Puspakom. However no evidence was adduced to prove to this court that the plaintiff had in fact suffered the loss as claimed.

[55] In its anxiety to claim from the defendant for loss of profit and other expenses, the plaintiff had not considered the fact that the agreement was extended from month to month from 1 December 2005 to 17 October 2006 and this period was never considered by the plaintiff.

[56] Further the plaintiff too had failed to substantiate its claim for the alleged maintenance costs of RM350,000 incurred in view of the intended renewal of the agreement, its termination of the drivers and all other related expenses for the permits fees, road tax and insurance for the intended renewal period. Not even a single receipt and or invoice was produced in this court to prove its claim under this heading.

[57] The plaintiff's allegation that the plaintiff and its employees were wrongfully evicted and that the plaintiff and its employees were threatened, embarrassed and humiliated were not supported by credible evidence and were exaggerated by the plaintiff's witnesses. In any event, the defendant had given ample notice *via* its letter dated 11 September 2006 which was received by the plaintiff on 18 September 2006 of its intention to terminate the month to month agreement if the plaintiff had not acceded to the defendant's request contained in the said letter. However the plaintiff chose to ignore the earlier notice given to them. The plaintiff's claim for aggravated and exemplary damages remained unproved.

Conclusion

[58] In view of the above, I am satisfied that the plaintiff had failed to prove its case against the defendant on the balance of probabilities. Accordingly I dismiss the plaintiff's claim against the defendant with costs of RM10,000 to be paid by the plaintiff to the defendant.